NO. 75-1083

In the Supreme Court of the United States

OCTOBER TERM, 1975

M. C. MANUFACTURING CO., INC., and
UNIVERSAL AUTOMATIC MACHINE CO., INC.,
Petitioners,

VS.

TEXAS FOUNDRIES, INC., and H/R PRODUCTS, INC.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioners, M. C. Manufacturing Co., Inc., and Universal Automatic Machine Co., Inc., (hereinafter collectively referred to as "Universal") respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on August 21, 1975.

OPINIONS BELOW

The opinion of the Court of Appeals is reported in 517 F. 2d 1059. No opinion was rendered by the district court.

JURISDICTION

The judgment of the Court of Appeals was entered on August 21, 1975. A timely motion for rehearing was denied on November 12, 1975, and this petition is filed within ninety days of that date. This court's jurisdiction is invoked under 28 U.S.C. Sec. 1254 (1).

QUESTIONS PRESENTED

Two questions are presented by this petition. One involves the Sherman Act, and the other involves the Robinson-Patman Act.

The Sherman Act Question

The Court of Appeals held that petitioners-plaintiffs, Universal, had failed to prove "fact" of injury resulting from a Sherman Act Section 1 violation. The proof showed that as a result of a forbidden conspiracy, Universal's chief supplier, respondent-defendant Texas Foundries, Inc., extended a lower price quotation to petitioners-plaintiffs' competitor, respondent-defendant H/R Products, Inc., which enabled H/R to become successful bidder for a government contract to produce type "G" lifting plugs. The Court of Appeals concluded (1) that the price granted H/R by Texas Foundries could not be utilized by Universal in proving "fact" of injury, i.e., in establishing that Universal could have secured the award, and (2) the evidence revealed that a third company, i.e., Land-Air, Inc., was second low bidder and would have secured the award in the absence of the conspiratorially low price. The first question, therefore, consists of two parts:

1. Did the Court of Appeals for the Fifth Circuit correctly conclude that Universal failed to establish "fact" of injury where,
   (a) the evidence shows that by utilization of the same price extended by Texas Foundries to H/R, Universal would have been the low bidder? and,
   (b) the evidence reveals facts upon which the jury could justifiably conclude that the second low bidder, Land-Air, Inc., was not eligible for and would not have received the award even in the absence of the H/R bid?

Robinson-Patman Act Question

With respect to the Robinson-Patman Act claim, the proof shows that on November 12, 1971, Universal entered a purchase-order contract with Texas Foundries for rough-cast plugs at a price of 32.5-cents each, F.O.B. Texas Foundries Plant (Lufkin, Texas). On November 18, 1971, Texas Foundries quoted 32.5-cents per casting price F.O.B. Texas Foundries plant, in response to Universal's request for quotation upon which to base a bid for Government Contract No. DAAA-09-72-0208. Texas Foundries represented that this was the lowest price it could or would extend, but on November 29, 1971 (according to the finding of the jury) Texas Foundries quoted a price of 31¢ per casting F.O.B. South Bend, Indiana (H/R's place of business) to H/R. As a result of these discriminatory quotations, Universal did not receive the award of Government Contract DAAA-09-72-C-0208, and therefore,, obviously, did not purchase rough castings from Texas Foundries with which to fulfill such contract. However, Universal (pursuant to the November 12, 1971 purchase order) and H/R (pursuant to its November 29, 1971 agreement) both purchased the same item (the rough cast plugs) from Texas Foundries, at different prices and upon different freight terms, during the same period of time. Despite this, the lower court held that Universal failed to prove that the discriminatory purchases were 'in competition" and therefore no violation of Robinson-Patman was demonstrated. Accordingly, the Robinson-Patman Act question is:

2. Is a Robinson-Patman Act violation established, <u>prima facie</u>, when the proof shows that

competiting bidders for the same Government awards are being sold the same item, at discriminatory prices, during the same period of time, albeit for two different contract awards, where one of the bidders is prevented from securing one of the contract awards because of the discrimatory pricing?

STATUTES INVOLVED

The statutory provisions involved are Section 1 of the Sherman Act (Title 15 U.S.C. Sec. 1), Section 2(a) and (f) of the Robinson-Patman Amendment to the Clayton Act, (Title 15 U.S.C. Sec. 14 (a) and (f)) and Section 4 of the Clayton Act (Title 15 U.S.C. Sec. 15) which provide, in pertinent part:

Sherman Act Section 1:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations is hereby declared to be illegal".

Robinson-Patman Act Section 2(a):

"It shall be unlawful for any person engaged in commerce in the course of such commerce, either directly or indirectly, to discriminate in price between purchasers, . . .".

Clayton Act Section 4:

"That any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States, . . ."

STATEMENT OF THE CASE

The facts of the case are summarized, in general fashion, in the initial portion of the opinion of the Fifth Circuit Court of Appeals. Additional facts are noted in the sections of the opinion relating to the "Sherman Act Claim" and the "Robinson-Patman Claim". Those facts are accurate, except to the extent specifically challenged in this application. (An "in-depth" analysis of the facts is contained in Appellee's Brief filed in the Fifth Circuit Court of Appeals, to which reference may be had if necessary). With this qualification, the statement of the case by the lower court is adopted.

REASONS FOR GRANTING THE WRIT

- Sherman Act Questio.

The opinion of the Fifth Circuit Court of Appeals recognizes that the jury was justified in finding a violation of Section 1 of the Sherman Act. The opinion states:

"If plaintiffs' theory of the case and version of the evidence were accepted by the jury, as they may have been, then a Sherman Act violation has been established."

However, the opinion holds that the "fact" of injury has not been established because ". . .plaintiffs failed to establish that in the absence of the defendant's discriminatory pricing scheme Universal would have received this contract".

The Court of Appeals correctly notes that the bid of Universal on contract DAAA-09-72-C-0208 was the third low bid submitted, the first being that of the defendant H/R and the second being that of Land-Air, Inc. Universal demonstrated, using the same profit and cost factors employed in submitting its bid, that had it received the same price as was extended to H/R it would have been the successful bidder, i.e., its bid would

have been substantially lower than that of H/R.[1] This would have made Universal the low bidder, since the record shows that the only other company to obtain a price quotation from Texas Foundries for this contract was Deco-Grand, whose bid was not in contention (and who, therefore, would not benefit from the same bid revision).

The Fifth Circuit Court holds that this "conspiratorially low" price extended to H/R must be disregarded in determining the "fact" of injury, i.e., whether Universal would have been the successful bidder. This is a novel proposition, without precedent. It is contrary to concepts engrained in antitrust laws. Comparable assumptions have long been sanctioned in proof of the extent of damages. For example, *Wall Products Co. v. National Gypsum Co.*,357 F. Supp. 832, allowed plaintiffs to recover the difference in the price actually paid for wallboard, and the price which it was assumed Plaintiffs would have been paid absent the conspiracy. *Cherokee Laboratories v. Rotary Drilling Services,* 383 F. 2d 97 (5th Cir. 1967) cert. den. 390 U.S. 904 sanctioned the assumption by plaintiff of defendant's sales figures in making a damage projection (of lost profits). *Lehrman v. Gulf,* 464 F. 2d 26 (5th Cir. 1974) cert. den., 409 U.S. 1077, and *Terrell v. Household Goods Carriers Bureau,* 494 F. 2d 16 (5th Cir. 1974) upheld assumptions of projected sales figures based on opinion (expert and non-expert) evidence, and *Hobart Brothers Co. vs. Malcolm T. Gilliland, Inc.,* 471 F. 2d 894 (5th Cir. 1973) cert. den. 412 U.S. 923, holds that damage proof can be based on assumptions if the assumptions rest on an evidentiary base. Obviously, therefore, Universal could assume the lower sales price for the purpose of proving extent of damages. What logic is there, therefore, in denying its use to prove fact of damages?

Reasoning further, it is obvious that the "conspiratorially

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1. Mr. Merle Childress testified that had the lower price extended H/R been granted to Universal, Universal's bid would have been submitted on this basis, i.e., with profit and other cost factors the same.

low" price is a fact that is an integral part of the proof of the conspiracy and an overt action pursuant to the conspiracy. Why then, must it be ignored when determining "fact" of damage? The illogic of the proposition is compound.

Furthermore, the role of the Land-Air bid was not properly examined by the lower court, which held: "It is crystal clear that Land-Air was a viable bidder and that, even after disregarding H/R's low bid because of the special conspiratorially low price it received from Texas Foundries, Land-Air's bid stood between Universal and the opportunity to acquire this contract." The evidence is to the contrary for, even accepting the Court of Appeals' position that the "conspiratorially low" price must be ignored in ascertaining "fact" of damage, the jury was justified in finding that Universal would have received the award, and that Land-Air was not eligible for and would not have received it. Though it is adequately shown by the record, an affidavit obtained from a Land-Air executive and submitted to the Court of Appeals in connection with the petitioners-plaintiffs' motion for rehearing lays to rest any question on the point.

These propositions will be discussed separately, with the latter proposition being discussed first.

1. Land-Air was not a viable bidder and did not stand between Universal and the opportunity to acquire the contract.

Bids on the contract in question were opened on December 3, 1971. App. 456. The contract award was signed on December 30, 1971. P. Ex. 46, App. 1397, et. seq. The pre-award surveys were held, as they are customarily held, within the period from the date of the bid opening to the date of the contract award. App. 211. The purpose of the pre-award survey is succinctly stated in the testimony of Mr. Childress (App. 207):

> "Q. Now, what does the term - if you are familiar it (sic) in connection with your dealings with the government or APSA - called a 'pre-award survey'?

"A. Upon notification that your company is either low bidder or within the realm of competitive prices, among the low bidders, then the government performs what they call a pre-award survey on usually the three low bidders. That is for the purpose of establishing qualifications of each company to ascertain the fact that they can perform if the government awards them the contract, at this pre-award survey where they delve into all aspects of your business".

The record reveals that there is a misconception and a misstatement in the following quotation critical to the lower court's opinion relating to the pre-award survey and Land-Air's status as a "viable bidder":

"While it is true that Land-Air's bid was initially classified as nonresponsive and consequently Land-Air did not receive a pre-award survey, a memo from the APSA contracts specialist in charge of contract DAAA-09-72-C-0208 negotiations introduced at trial reveals that an amendment was received from Land-Air on December 1, which negated the previous non-responsive action considered, and led to reinstatement of Land-Air's bid prior to award. It is crystal clear that Land-Air was a viable bidder and that, even after disregarding H/R's low bid because of the special, conspriatorially low price it received from Texas Foundries, Land-Air's bid stood between Universal and the opportunity to acquire this contract."

Land-Air's failure to receive a pre-award survey was not a consequence of the initial classification of Land-Air's bid as non-responsive, though it is true that Land-Air's amendment caused a change in the previous classification, and was in time for the bid opening December 3, 1971. App. 1394. P. Ex. 43. The amendment was inadvertently misdirected and placed with the "no bid" responses, but this was corrected and the Bid Opening Officer and Recorder were notified of the error on December 17,

1971, and corrective action was taken. App. 1394. This was well within the pre-award survey phase, as is evidenced by the fact that the pre-award survey of Universal Automatic Machine Company, Inc., was not made until December 16, 1971. P. Ex. 45, App. 1396.

Therefore, a pre-award survey could have been made prior to the bid award had Land-Air been considered for the award. But the record conclusively demonstrates that Land-Air received no pre-award survey and was not in position to be considered for the award, and therefore was not a "viable bidder".

H/R, Universal, and AMS Manufacturing, Inc. of Amityville, N. Y., were all subjected to pre-award surveys. AMS submitted the fourth low bid. P. Ex. 43, App. 1391. *Government regulations require a pre-award survey to determine whether a bidder is "responsible"* (to be distinguished from "responsive") *and entitled to an award.* Witness the following excerpts from the testimony of Anthony Costa, Supervisor Contracts Speicalist, Procurement Division, United States Army Ammunitions Command, Joliet, Illinois: (App. 397-399)

"Q. What constitutes the evaluation phase? What specific activities and various distinct categories make up a part of the evaluation phase?

"A. The first thing that would be considered is to review the bid packages of those within the zone of consideration of an award to verify that they are all responsive.

"Q. What establishes the criteria for the zone of consideration?

"A. Well, if one award is made - - it depends on the bid process. The one award is made and maybe ten bids submitted, and the first four maybe are close.

"Then the balance on the remaining six, see, the prices are entirely out of line, then you would concentrate

on the first four on this particular example I'm giving.

"Q. Yes sir. You would select from all the bids those that appear to be more nearly competitive with each other as to price?

"A. Yes. You would include all bids in the evaluation but would concentrate on the low. You would check all the packages to see that they are all responsive to the invitation..

"Q. You probably have had occasion where bidders simply did not meet some specification in the invitation to bid and, therefore, would have to be eliminated?

"A. Yes. If a bidder is non-responsive, he can be eliminated.

"Q. Let me go on the record and ask you about this particular lift plug bid that we have identified and whether it had any restriction on it concerning the type of prime contractor that would have to be selected by you folks?

"A. Yes. This solicitation, the one you asked about - - Do you want me to repeat the number?

"Q. No, sir.

"A. It was a one hundred percent small business set-aside.

"Q. Could you tell us what that means?

"A. It was restricted to small business firms.

"Q. What is the next step, sir, in this part of the

evaluation phase?

"A. *The next step would be to request a pre-award survey on that firm or firms that you feel would have to be termed as responsible producers.*

"Q. What is a 'pre-award survey'? How would you define that for us?

"A. I think the name in itself indicates what it is. Do you want a better or different answer?

"Q. Let me ask you this: *Your rules and regulations require that a pre-award survey team be constituted to evaluate a certain number of bidders in a given contract to determine whether or not they are responsible bidders?*

"A. *Yes, sir."* (Emphasis supplied)

There is one instance in which a bidder can be determined to be "responsible" without a pre-award survey: (App. 410)

"Q. Do your regulations require a pre-award survey for any prime contractor under consideration to be awarded a bid?

"A. No.

"Q. In what instance would it not be?

"A. *Well, if we have records here to justify that that responsive bidder is responsible, we can make that decision with a Contract Officer's determination.*

"Q. *But in the instance we are talking about there was a pre-award survey on H/R and Universal and Amityville, New York.*

"A. *That's what the records show here.*" (Emphasis supplied)

This testimony in itself supports the conclusion that the jury reached, (i.e., that Universal would have received the award), since there was never a determination of any sort that Land-Air was a responsible bidder. But there is more support in the record.

First, one of the reasons for making the "responsible" determination is pertinent: (App. 419)

"Q. Do you require your potential prime contractors to advise you in this lift plug situation of their intended source of supply of raw castings?

"A. You mean prior to award?

"Q. Yes, sir.

"A. This is required in the pre-award survey.

"Q. Why is it required?

'A. Well, to assure he would be a responsible prime contractor; and to be a responsible prime contractor he has to show who he will get his supplies from."

This was never done with respect to Land-Air.

Next, the testimony elaborates on the basis for making a "responsible" determination without a pre-award survey: (App. 428-430)

"CROSS EXAMINATION BY MR. HATHAWAY:

"Q. Now, can you give me the status of those four bidders after evaluation with reference to their relative

positions?

"A. Do you want them in order, sir?

"Q. As to who they were, yes, sir. In other words H/R must have been first; they got the contract?

"A. Yes.

"Q. Can we get the price now? I want to know who numbers two, three and four were after evaluation.

"A. The evaluated bid price for H/R is .47362, and the evaluated bid price for Universal is .49107. Is that all you want?

"Q. No. I want three and four. Who is that?

"A. The second one was Land-Air which was .48678. The third lowest was Universal Automatic Machine and I gave you that figure. The fourth lowest was AMS Manufacturing Incorporated, .517482.

"Q. If H/R Products had not bid that contract, or if for some reason they had indicated after opening for the bids that they could not perform and preferred not to perform, then who would have gotten the contract? Would it have been Land-Air?

"A. After opening bid, if they didn't want to perform, then they would have to go through regulatory procedures to withdraw their bid.

"Q. There is a regulatory procedure for this?

"A. Yes.

"Q. And if it had not taken place and Land-Air had

received the contract - -

"A. (interrupting) They would be the next lowest responsive. *I don't know if they were responsible or not, but if they had the pre-award and passed they would be next in line.*

"Q. We don't know if you had a 1524 on Land-Air did we?

"A. I didn't see it.

"Q. You didn't?

"A. No. There's reasons. *Maybe they were making the item at the time. I don't know. It could have been determined as a responsible procedure.*

"Q. Let me request at this point if upon signing this deposition if a Form 1524 can be found on Land-Air, would you then attach that as Defendant H/R Exhibit?

"A. Yes.

'Q. If one is found?

"A. Yes."

No. "1524", i.e., pre-award survey form, relating to Land-Air was ever found or attached, and it is obvious that no pre-award survey of Land-Air was ever made. Thus, under Costa's testimony, Land-Air could not have been "next in line", with no pre-award survey, unless determined by a contract officer to be "responsible". *There was no such determination.*

The record even conclusively demonstrates that Land-Air could not have been considered "responsible" without a pre-award survey. As noted in the lower court's opinion, Universal received the only government contract let in 1970. This contract

was awarded on June 16, 1970, and, with additions, was still being performed when the contract in question was let in December, 1971. Thus, it is obvious that Land-Air was not "making the item at the time". No basis existed for determining Land-Air to be responsible. There is not even the slightest hint in the record or in any of the papers relating to the award of the contract in question that Land-Air fell into any category that could be considered responsible without a pre-award survey. Even H/R, which has previously furnished more Type G lifting plugs to the government than any other known company, and Universal, which was in the process of satisfying the existing contract with the government, were required to have pre-award surveys. Furthermore, the contract in question had a 50-percent option provision. Since Land-Air's bid was very close to H/R's, if Land-Air had been a viable bidder, a survey would have been made to determine if Land-Air was eligible for one-half of the award.

It is therefore apparent that Land-Air was not the subject of a pre-award survey and was not considered for the bid award. The reason for this may not be clear in the record, though the jury could certainly conclude from the evidence that Land-Air was not "responsible". However, because of the lower court's opinion, an affidavit of the Chairman of the Board and Chief Executive Officer of Land-Air was obtained, which explains why Land-Air was not considered (and why Land-Air was obviously determined not to be "responsible"). It is here reproduced:

THE STATE OF TEXAS
COUNTY OF TARRANT

KNOW ALL PERSONS BY THESE PRESENTS:

BEFORE ME, the undersigned authority, on this day personally appeared PAT RUTHERFORD, who, being by me first duly sworn upon his oath states that he is over the age of 18 years and in no way incapacitated to make this Affidavit, and that the following facts are true and correct:

My name is PAT RUTHERFORD. I was the Chairman of

the Board and Chief Executive Officer of Land-Air, Inc., and I am presently living in Honolulu, Hawaii. I am personally familiar with the facts concerning a government contract for Type "G" Lifting Plugs, which was awarded in late 1971 or early 1972 by the Ammunition Procurement Supply Agency, APSA, then located at Joliet, Illinois. I believe the government contract on this procurement was numbered DAAA-09-72-C-0208 and it is my recollection that the bids were opened on or about December 3, 1971. I had determined that after the bids were opened the second lowest bid was submitted by my Company, Land-Air, Inc. Although we were at first determined to have filed a non-responsive bid, we amended our original bid which was received by the government on or about December 1, 1971, which re-instated our bid prior to the award. In connection with our bid on this matter and I believe that the records will show that our bid was .48678 ¢ per plug, we determined from our principal supplier, Link-Belt of Indianapolis, Indiana that they were unable to supply us the unfinished plug castings or rough castings as they could not produce them sufficiently early enough to comply with the government contract in issue. Accordingly, I informed the government officials at APSA, Joliet, Illinois that my Company did not have a supply source for the unfinished plug castings and that my Company, Land-Air, Inc., was, therefore, withdrawing its bid and we did so. My company never received a pre-award survey on this particular contract because our bid had been withdrawn and I understood government procurement regulations to require such a pre-award survey before any award as a prerequisite to obtaining all or part of the government contract in issue.

We have supplied these finished Type "G" Lifting Plugs on government contracts or APSA before the fall of 1971, but we had completed our last order about a year before or sometime in 1970 and had been out of production for substantially a year at the time we submitted the bid referred to hereinabove.

/s/ PAT RUTHERFORD

Thus, the affidavit reveals that Land-Air removed itself from

consideration for the award because it was informed by its supplier, Link-Belt, that Link-Belt could not supply the necessary raw castings. Referring again to Costa's testimony, this is the prime consideration in determining whether a contractor is "responsible". This makes abundantly clear the fact that Land-Air was not in contention for the contract in question.

The affidavit is "outside the record", but the record supports the obvious jury finding that Land-Air, without a pre-award survey or contract officer's determination that it was a responsible bidder, was not considered responsible and was not eligible for the award.

If petitioners are wrong, in this, it is submitted that bringing an incontrovertible fact to the attention of the court by affidavit is proper where the lower court's opinion is based upon an erroneous conclusion with respect to that fact and the entire disposition of the cause hangs in the balance. It is within the province of this court to reverse and remand for further development of the facts, where the integrity of the judicial process so demands. *U.S. v. Shotwell Mfg. Co.*, 78 S. Ct. 245, 355 U. S. 233, 2 L. Ed. 234; *Youngstown Sheet & Tube Co. v. Lucey Products Co.*, 403 F. 2d 135 (5th Cir. 1968). The latter case holds that although, generally, failure to put on all proof necessary for a judgment is fatal error, there are occasions when innocent, and justifiably unknowing litigants are entitled to a remand to insure that substantial justice be done. This is certainly such a case, for how could plaintiffs know that the Court would deny the use of the lower price to prove fact of damage, or that Land-Air would be called a viable bidder when the bid record indicated otherwise? Obviously, therefore, if the Court concludes that the record does not justify the jury's finding, justice requires that the case be remanded.

2. Respondents' recalculations of the bid based upon the lower price extended H/R by Texas Foundries cannot be disregarded.

The Court of Appeals' opinion concludes that the recalculation of the bid based upon the lower price extended by

Texas Foundries to H/R cannot be considered for the purpose of determining whether Universal would have been low bidder in the absence of the discriminating pricing scheme. This conclusion is based on the reasoning that the Sherman Act is designed to facilitate competition and eliminate anticompetitive acts, and that application of this basic principle requires that the lower price extended to H/R be disregarded. This conclusion is novel, and apparently of first impression, but it is without authority or reason.

Facilitation of competition generally promotes lower prices and more efficient business administration. It is more reasonable to conclude, as the jury was free to do, that since Texas Foundries had the ability to extend the lower price to one competitor, it should have extended the same price to all to whom it issued price quotations. Had it done so, the record shows that Universal could and would have submitted a lower bid than H/R, and would have obtained the award.

The lower price has to be treated as a fact. It was granted by Texas Foundries to H/R. It was a part of the basis for the jury's finding of the conspiracy, and constituted an overt act pursuant to the conspiracy. Obviously, it could be considered in measuring the extent of damages. (Support for this proposition is found in the cases cited in the initial discussion of REASONS FOR GRANTING THE WRIT, *Supra*. Certainly, therefore, there is no reason to deny use of the fact (of the lower price) to prove "fact" of damage, i.e., to prove that Universal would have secured the award had it secured the same price.

The Robinson-Patman Question

With regard to the Robinson-Patman claim, the Court recognizes that H/R and Universal purchased from Texas Foundries "contemporaneously", i.e., within the same time-frame, but holds that "plaintiffs have failed to prove that the purchases were made 'in competition'". The Court reached this conclusion because of its reasoning that "the government selection under both the 1970 contract and the December, 1971 contract of a single producer for each precluded the possibility of competition

between these suppliers as a matter of law". The Court categorized the separate contracts as "separate, distinct market(s) open only to a single producer".

The latter proposition clearly is not true, for the pre-award survey contained a request that the survey cover a 50-percent option of the quantity awarded. Therefore, H/R and Universal were in competition for either one-half or 100-percent of the quantity awarded, and could have wound up selling to the same customer (the government) under the same contract. Furthermore, the fact that H/R was ultimately awarded 100-percent of the contract quantity does not keep H/R and Universal from being "competitive purchasers" as required by the act. This proposition is established by *American Can Company vs. Bruce's Juices,* 187 F. 2d 919 (5th Cir. 1951) modified 190 F. 2d 73, 74. There it was established that *American Can* extended arbitrary and discriminatory terms to *Bruce's Juices* on a item known as the "3.12 Iscan" (a can used as a container for citrus juices sold in competition with bottled drinks). This prevented *Bruce's Juices* from buying any of the 3.12 Iscans, as pointed out by the Court at page 923:

> "The fact that it was denied the benefit of the lower price on the 3.12 Iscan in the above manner made it financially impossible for Plaintiff to purchase that particular Iscan along with its competitors."

This Court then held, however, that the failure of the Plaintiff to purchase the 3.12 Iscan did not deny the Plaintiff the status of a competing purchaser under the act, stating at page 924:

> ". . .Moreover, Plaintiff was not bound to purchase the 3.12 Iscan upon such terms in order to attain the status of a competing purchaser under the act, *as its failure to do so was directly attributable to Defendant's own discriminatory pricing."*

By the same token Universal's failure to purchase either

APPENDIX

M. C. MANUFACTURING COMPANY, INC., et al., Plaintiffs-Appellees,

v.

TEXAS FOUNDRIES, INC., et al., Defendants-Appellants.

No. 74-2246.

United States Court of Appeals, Fifth Circuit.

Aug. 21, 1975.

A private antitrust action was brought wherein plaintiffs claimed that defendants had conspired to restrain trade in violation of section 1 of Sherman Act through the utilization of an illegal price discrimination scheme. The United States District Court for the Eastern District of Texas, at Marshall, William M. Steger, J., entered judgment for plaintiffs, and defendants appealed. The Court of Appeals, Clark, Circuit Judge, held that plaintiff which failed to prove that in the absence of defendants' discriminatory pricing scheme it would have received government supplier contract in question failed to present jury issue on Sherman Act claim; and that purchases were not made "in competition," as required in order to establish Robinson-Patman Act discriminatory pricing claim.

Reversed.

1. **Monopolies—28(7.1, 7.2)**
Proof of existence of an actionable conspiracy is not enough to establish a section 1 Sherman Act claim; in addition to proof that antitrust laws were violated, a plaintiff must also establish that such violation proximately caused injury to his business and adduce evidence that at least gives an indication of the amount of damage which resulted. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

2. **Monopolies—28(8)**
Plaintiff which failed to prove that in the absence of defendants' discriminatory pricing scheme it would have received government supplier contract in question failed to present jury issue on Sherman Act claim, where evidence disclosed that even if defendant supplier's bid had been disregarded plaintiff would not have been the low bidder, despite plaintiff's hypothetical recalculation of its bid based upon prices the conspiracy fetched for defendant supplier. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

3. **Monopolies—10**
Purpose of Sherman Act is preservation of open, competitive marker. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

4. **Monopolies—28(7.6)**
Damages are recoverable in private suit on Sherman Act claim only upon showing that in the absence of anticompetitive practice complained of plaintiff would not have suffered the loss asserted. Clayton Act, § 4, 15 U.S.C.A. § 15.

5. **Trade Regulation—911**
In order for there to be discrimination between purchasers violative of section 2(a) of Clayton Act, there must be actual sales at two different prices to two different actual buyers. Clayton Act, § 2(a, f) as amended by Robinson-Patman Price Discrimination Act, 15 U.S.C.A. § 13(a, f).

6. **Trade Regulation—914**
Robinson-Patman legality of price discrimination between contracts to purchase that contemplate contemporaneous delivery must be evaluated as of dates the respective contracts were made. Clayton Act, § 2(a, f) as amended by Robinson-Patman Price Discrimination Act, 15 U.S.C.A. § 13(a, f).

7. **Trade Regulation—913**
Discriminatory pricing is violative of Robinson-Patman only when it lessens or tends to prevent competition between customers or between sellers. Clayton Act, § 2(a, f) as amended by Robinson-Patman Price Discrimination Act, 15 U.S.C.A. § 13(a, f).

8. **Trade Regulation—913**
To constitute a Robinson-Patman wrong, price discrimination must occur between competitors in comparable transactions, that is, where persons receiving different prices are in actual, functional competition with one another, and must have requisite effect upon actual or potential competition. Clayton Act, § 2(a, f) as amended by Robinson-Patman Price Discrimination Act, 15 U.S.C.A. § 13(a, f)

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9. Trade Regulation—913

Even if sales at different prices are contemporaneous, involve goods of like grade and quality, price distinction is not justified by good business cause and it causes injury to the disadvantaged purchaser, recovery under Robinson-Patman Act is precluded absent proof that price variance detrimentally affected competition. Clayton Act, s 2(a, f) as amended by Robinson-Patman Price Discrimination Act, 15 U.S.C.A. s 13(a, f).

10. Trade Regulation—913,932

Competition between buyers at disparate prices is essential to a violation of Robinson-Patman Act and existence of this requisite is normally a fact question to be determined by making a realistic appraisal of all relevent facts. Clayton Act, s 2(a, f) as amended by Robinson-Patman Price Discrimination Act, 15 U.S.C.A. s 13 (a, f).

11. Trade Regulation—913

Purchases were not made "in competition" as required in order to establish Robinson-Patman Act Discriminatory pricing claim, where plaintiff contractor's purchases of lifting plugs could only be accepted by government in fulfillment of 1970 contract while defendant contractor's purchases similarly could be used only on 1971 contract and, regardless of subsequent discrepancy in price to these suppliers, by defendant seller, government had to purchase from each, and only from each, the specified number of plugs at agreed price under respective contracts. Clayton Act, s 2(a, f) as amended by Robinson-Patman Price Discrimination Act,15 U.S.C.A. s 13(a, f).

12. Trade Regulation—913

Injury to a competitior is not test for Robinson-Patman violation; test is injury to competition. Clayton Act, s 2(a, f) as amended by Robinson-Patman Price Discrimination Act, 15 U.S. C.A. s 13(a, f).

Appeal from the United States District Court for the Eastern District of Texas.

Before GOLDBERG, CLARK and GEE, Circuit Judges.

CLARK, Circuit Judge:

Plaintiffs, M. C. Manufacturing Company, Inc. (M.C.), and its wholly-owned subsidiary, Universal Automatic Machine Company, Inc. (Universal), initiated this private antitrust action against defendants, Texas Foundries, Inc. (Texas Foundries) and H/R Products, Inc. (H/R), alleging that the defendants conspired to restrain trade in violation of Section 1 of the Sherman Act, 15 U.S.C. s 1, through the utilization of a price discrimination scheme which also was violative of Section 2 of the Clayton Act as amended by the Robinson-Patman Act, 15 U.S.C. s 13(a & f). Trial to a jury resulted in a general verdict for plaintiffs of $73,000.00 which was then trebled by the trial court to $219,000.00. Texas Foundries and H/R petition this court for relief from the judgment entered pursuant to that award. We reverse.

Universal alleges that this controversy arose while it and H/R were actively competing for a December, 1971 government contract to supply a finished military hardware item known as a Type "G" lifting plug,[1] because Texas Foundries quoted H/R a lower price than it quoted Universal to supply the required unfinished plug castings.[2] According to plaintiffs, H/R and Texas Foundries clandestinely agreed by telephone on the 29th of November, 1971, to a price of 31 cents per unfinished plug casting delivered to H/R's plant (South Bend, Indiana). Texas Foundries had quoted Universal a price of 32.5 cents f.o.b. Texas Foundries' plant (Lufkin, Texas) only 11 days earlier, on the 18th of November. Plaintiffs assert that the price discrepancy between the two offers was the result

1. The Type "G" lifting plug is a malleable iron device which the military services use to lift 155 mm. artillery projectiles. The lifting plug has a loop at one end, known as the "bail," and is threaded on the other end for insertion into the nose of an unfused artillery projectile, thereby facilitating the movement of such projectiles. When a projectile is to be fired, the lifting plug is removed and replaced by an appropriate fuse. Because their purpose is use with large caliber munitions, the only end-user market for lifting plugs is the military arm of the United States government.

2. The term "unfinished plug casting" refers to a basic casting made by a foundry which has not been machined and threaded into its final form as a lifting plug which will meet contract specifications.

of a conspiracy between Texas Foundries and H/R in violation of Section 1 of the Sherman Act aimed at the destruction of Universal as a competitor. They further assert that the ultimate sale to H/R of a portion of the castings required to perform the contract at the lower price constituted a violation of the Robinson-Patman Act's proscription of price distinctions between purchasers since on November 12, 1971, Texas Foundries and Universal had entered into a subcontract at 32.5 cents per casting to fulfill a prior government contract award to Universal.[3]

For their part, the defendants contend that Texas Foundries' agreement to sell to H/R at a lower price was reached after the December, 1971 contract had been awarded and then only after H/R's intended suppliers communicated to H/R that they could not satisfy H/R's requirements. They further contend the price reduction by Texas Foundries was intended to meet the price offered by H/R's other suppliers and to find a market for a substantial overage of castings which had been produced under Texas Foundries' preexisting contract with Universal.[4]

Because the particular facts underlying this case are crucial to our resolution of the controversy, a detailed review of the events leading to selection of a contractor on government contract No. DAAA—09—72—C—0208 is warranted.

On October 27, 1971, the Ammunition Procurement Supply Agency (APSA) distributed a solicitation inviting bids on a contract to supply 1,984,006 Type "G" lifting plugs. A total of 159 prospective bidders were solicited, of which 16, including Universal and H/R, ultimately submitted bids.

Upon receiving a solicitation from the APSA, Universal asked Texas Foundries to bid on a subcontract to supply unfinished plug castings. On November 18, 1971, Texas Foundries responded with a 32.5-cent per casting price, f.o.b. Texas Foundries' plant. Based upon Texas Foundries' quotation for the unfinished plug, Universal submitted a final bid to APSA of 49.28 cents per finished plug. During the time prior to opening of bids, Texas Foundries was also called upon by several other potential bidders to give similar casting price quotations. As a result, Texas Foundries sent written quotations to both Deco Grand, Inc., an uninvolved third party, and H/R containing the identical price quoted Universal, *i. e.*, 32.5 cents per casting, f.o.b. Texas Foundries' plant.

The sixteen bids ultimately received on the APSA contract were opened on December 3, 1971, revealing that H/R was the low bidder at 47.6 cents per casting, Land-Air, Inc. was second at 48.8 cents per casting, and plaintiff, Universal, was the third lowest bidder at 49.28 cents per casting. Pre-award surveys and cost evaluations[5] were then conducted on the lowest group of bidders.[6] These studies resulted in evaluated bids (lowest cost to government) of 47.362 cents per plug for H/R, 48.678 cents per plug for Land-Air, Inc. and 49.107 cents per plug for Universal. Having thus entered the lowest evaluated bid and having received a satisfactory pre-award survey analysis, H/R was awarded the contract on December 30, 1971.

3. Universal had been successful on June 16, 1970 in bidding on a similar government contract. This award to Universal was for 2,033, 950 plugs with an "add-on" award of 450,000, plus a negotiated addition of 750,000 plugs.

4. Universal purchased approximately 1,500,000 unfinished plugs from Texas Foundries while fulfilling its 1970 contract with add-ons and additions.

5. The pre-award survey involves government assessment of such factors as a bidder's financial status, production capability, technical capability, plant facilities and quality assurance capabilities; while the cost evaluation takes into account such factors as transportation costs, a bidder's use of government-owned equipment or facilities and discounts. That bidder who is shown to have the bid which evaluates lowest along with a feasible pre-award survey is then considered eligible for an award. The award must be made to that responsible bidder who submitted the lowest responsible bid, "unless there is a compelling reason to reject all bids and cancel the invitation." 32 C.F.R. s 2.404-1.

6. Land-Air was not surveyed because of an original determination that its bid was not responsive. After amendment, however, Land-Air's bid was reinstated and evaluated. *See* Text, infra at pp. 7419, 7420.

Appendix 4

SHERMAN ACT CLAIM

At trial plaintiffs' evidence tended to show a discriminatory pricing conspiracy between Texas Foundries and H/R aimed at the destruction of Universal as a producer of Type "G" lifting plugs. From the outset, plaintiffs have contended that on the 29th of November, 1971, Texas Foundries and H/R consummated a secret telephonic agreement whereby Texas Foundries committed itself to supply unfinished plugs to H/R at 31 cents per casting, at H/R's plant, after only eleven days earlier having assured Universal that a 32.5 cent per casting price, f.o.b. Texas Foundries plant, was the lowest price it could possibly offer. The reason for this discrepancy in price quotations is found, according to plaintiffs in H/R's precarious financial situation in November of 1971. Until 1970, the year of Universal's entry into the lifting plug market, H/R had been the leading producer of military lifting plugs. In 1970, however, Universal received the only government contract let that year, causing H/R a concomitant 60,000 dollar loss. At this point, plaintiffs' theory continues, realizing that failure to obtain the 1971 contract would necessitate abandonment of its plug business and fully aware that Universal's failure to get at least a portion of the 1971 contract would portend the latter's business demise,[7] H/R resolved to take whatever steps were necessary (including participation in a discriminatory pricing scheme) to insure that it would not again be underbid by Universal.[8]

[1] If plaintiffs' theory of the case and version of the evidence were accepted by the jury, as they may have been, then a Sherman Act violation has been established. We assume arguendo that the jury verdict was based on this premise, and that it was supported by the evidence. Under Section 1, 15 U.S.C. s 1, "Every contract, combination . . . or conspiracy, in restraint of trade or commerce . . . is declared to be illegal." However proof of the existence of an actionable conspiracy is not enough. In addition to proof that the antitrust laws were violated, a plaintiff must also establish that such violation proximately caused injury to his business and adduce evidence that at least gives an indication of the amount of damage which resulted. Terrell v. Household Goods Carriers' Bureau, 494 F.2d 16, 20 (5th Cir.), *rehearing en banc denied*, 496 F.2d 878, *cert. dismissed*, 419 U.S. 987, 95 S.Ct. 246, 42 L.Ed.2d 260 (1974); Kestenbaum v. Falstaff Brewing Corp., 514 F.2d 690 (5th Cir. 1975).

[2] Under the facts of this case, plaintiffs failed the second of this three-pronged test, *i. e.*, they failed to prove that an injury to Universal resulted from defendants' discriminatory pricing scheme. While the fact of injury most often involves evidentiary questions which are properly for the jury [*e. g.*, Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 562, 51 S.Ct. 248, 250, 75 L.Ed. 544, 548 (1931)] no such jury issue exists where, as here, plaintiffs failed to establish that in the absence of defendants' discriminatory pricing scheme Universal would have received this contract. Thus, the trial court erred in refusing to direct a verdict for defendants on the Sherman Act claim at the close of plaintiffs' case.

Plaintiffs' premise is that, absent the illegal bid to H/R, Universal would have received the contract. However, the facts as adduced at trial reveal that even if H/R's bid is disregarded, Universal would not be the low bidder. Rather,

7. In fact, after losing the 1971 contract to H/R Universal was unable to acquire other work in the commercial field sufficient to hold its shop intact, and finally had to liquidate its equipment.

8. Other evidence supportive of plaintiffs' conspiracy theory included: proof that H/R would not consider itself able to bid unless it had positive commitments for all the plug castings it would need; H/R's knowledge prior to submission of its bid that its registered supplier, Marion Malleables, could not produce the rough castings in sufficient quantity to satisfy government requirements; H/R's assertion that still another supplier, F.M.C. Corporation, would supply the additional plugs necessary to meet the government's requirements, while during trial H/R's President admitted that no firm commitment was received from F.M.C. until after the contract was awarded; H/R's failure to notify the government of its "change" in suppliers until specifically asked to do so despite the requirements of pre-award disclosure and contract-in-process certifications; and Texas Foundries' realization that it would have a substantial overrun on its contract with Universal unless it found an alternate market for this material.

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Land-Air, Inc., a party wholly unconnected with either defendant, stands second behind H/R. Thus, without H/R's bid, Universal still would not have received the contract. To show that the asserted conspiracy did in fact injure them, plaintiffs contend that Land-Air was not a viable intermediary. They point out that its bid was classified by the APSA as unresponsive and therefore its position should not be considered. While it is true that Land-Air's bid was initially classified as non-responsive and consequently Land-Air did not receive a pre-award survey, a memo from the APSA contract specialist in charge of contract DAAA–09–72–C–0208 negotiations introduced at trial reveals that an amendment was received from Land-Air on December 1, which negated the previous non-responsive action considered, and led to reinstatement of Land-Air's bid prior to award. It is crystal clear that Land-Air was a viable bidder and that, even after disregarding H/R's low bid because of the special, conspiratorially low price it received from Texas Foundries, Land-Air's bid stood between Universal and the opportunity to acquire this contract.

Plaintiffs attempted to circumvent the intervening position of Land-Air, Inc. through a hypothetical recalculation of the bid submitted by Universal. This recalculation was based upon the assumption that Universal should be entitled to utilize a price per casting equivalent to the 31-cent f.o.b. South Bend price which the conspiracy fetched for H/R. By utilizing this price and applying the same profit and other cost factors it had employed in submitting its bid based upon the 32.5-cent price, Universal calculated it would have bid an amount below those entered by both H/R and Land-Air, Inc., thus seeking to show the conspiracy did cost it the contract award. The fallacy in this theory, however, is Universal's utilization of the 31-cent delivered price given to H/R.

[3, 4] The avowed purpose of the Sherman Act is the preservation of the open, competitive market. See, *e. g.*, Northern Pac. Ry. v. United States, 356 U.S. 1, 4, 78 S.Ct. 514, 517, 2 L.Ed.2d 545 (1958); Apex Hosiery Co. v. Leader, 310 U.S. 469, 492–93, 60 S.Ct. 982, 992, 84 L.Ed. 1311 (1940). Damages are recoverable thereunder if a plaintiff can show that the anticompetitive practice which inhibits that protected freedom of competition has proximately caused the damages he asserts. 15 U.S.C. s 15. For the case at bar, this rule means that damages are recoverable only upon a showing that absent the anticompetitive practice plaintiff would not have suffered the loss. The anticompetitive conduct which the evidence tended to establish in the case at bar was Texas Foundries' special 31-cent price to H/R, not its refusal to offer a comparable price to H/R's competitors. The price of 32.5 cents f.o.b. Texas Foundries plant was shown to be the standard or usual market price quoted in connection with this bidding. It was the price initially quoted to H/R. It was the only price quoted to Universal and it was also the price quoted to an univolved third party, Deco Grand, Inc. Evidence of Texas Foundries' other dealings during this period further confirms that the 31-cent price was the conspiratorial price.[9]

Restoration of the competitive freedom which the Sherman Act is designed to protect through elimination of the anticompetitive practice is accomplished here by disregarding the special conspiratorial price to H/R, not by hypothetical broadening of the conspiracy to give H/R's abnormally low price to Universal as well. The problem for Universal is that it is not enough to merely restore the open competitive market status by knocking out the conspiracy, for then Land-Air, not Universal, would have become the lowest bidder. But more cannot be done. The result is that the conspiracy did not cause the damages upon which recovery was based, and, therefore, the verdict cannot be sustained under the Sherman Act.

ROBINSON-PATMAN ACT CLAIM

Plaintiffs also assert that defendants' buy-sell agreement at 31 cents per casting was violative of Section 2(a & f) of the Clayton Act as amended by the Rob-

9. Texas Foundries charged Universal the 32.5-cent price in their November, 1971 purchase-order contract for 740,000 plugs to complete Universal's 1970 contract addition. In neither of their previous purchase-order contracts did Texas Foundries' price drop below 32 cents per unfinished plug casting. While the issue of which party was to pay the freight is in dispute under two of these contracts, under no circumstance would the ultimate cost to Universal per unfinished plug casting ever fall below the 31 cents f.o.b. South Bend price granted H/R.

inson-Patman Act, 15 U.S.C. s 13(a & f). Under Section 2(a), it is unlawful for any person engaged in commerce to discriminate in price (1) between different purchasers (2) of commodities of like grade and quality (3) where the effect of such discrimination is to substantially lessen competition or tend to create a monopoly, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination and (4) where such differential is not in response to changing market conditions,[10] while under Section 2(f), it is unlawful to knowingly induce or receive discrimination in price prohibited by this section.

[5, 6] Recognizing that in order for there to be discrimination between purchasers violative of s 2(a) "there must be actual sales at two different prices to two different actual buyers,"[11] plaintiffs pursue the Robinson-Patman claim on the basis of the price discrepancy between Universal's purchase-order contract with Texas Foundries dated November 12, 1971 and H/R's clandestine November 29th agreement with Texas Foundries which related to the December 30, 1971 contract.[12] These separate contracts contemplated contemporaneous delivery of Type "G" lifting plugs during 1972 but H/R was given a price of 31 cents delivered at its plant while Universal was given the substantially higher price of 32.5 cents at Texas Foundries' plant.[13]

Alternatively, plaintiffs argued at trial that a Robinson-Patman violation had occurred even if the jury believed that no agreement was reached by Texas Foundries and H/R on the 29th of November, but rather was made later—after the contract was awarded—and as a result of the failure of H/R's expected supplier to produce. They contend that even a January, 1972 agreement would still be reasonably contemporaneous with the November, 1971 agreement between Texas Foundries and Universal, since delivery was contemplated during the same periods under both contracts and no justification based upon a change in market conditions or good faith meeting of competition was shown.

Defendants contest the sufficiency of proof on every element essential to a Robinson-Patman Act violation. We need not weigh each element, however, as our conclusion that plaintiffs have failed to prove that the purchases were made "in competition" forestalls the necessity of further consideration of plaintiffs' claim under the Act.

[7-9] Discriminatory pricing is violative of Robinson-Patman only when it lessens or tends to prevent competition between customers or between sellers.[14] To constitute a Robinson-Patman wrong, the price discrimination must occur between competitors in comparable transactions—*i. e.*, where persons receiving the different prices are in actual, functional competition with one another—and it must have the requisite effect upon actual or potential competition.[15] Even if the sales at different prices are contemporaneous, involve goods of like grade and quality, the price distinction is not justified by good business cause, and it causes injury to the disadvantage purchaser, recovery under the Act is precluded absent proof that the price variance detrimentally affected competition.[16]

[10-12] Competition between the buyers at disparate prices is essential to a violation of the Robinson-Patman Act, *see* Ag-Chem Equipment Co., Inc. v. Hahn, Inc., 480 F.2d 482, 490-91 (8th Cir. 1973), and the existence of this requisite is normally a fact question to be determined by making a realistic appraisal of all the relevant facts. F.T.C. v. Sun Oil Co., 371 U.S. 505, 527, 83 S.Ct. 358, 9 L.Ed.2d 466 (1963). However, in the case at bar the relevant facts are without dispute. The government's selection under both the 1970 contract addition and the December, 1971 contract of a single producer for each precluded the possibilty of competition between these suppliers as a matter of law. Universal's purchases proven here could only be accepted by the government in fulfillment of the 1970 contract addition, while H/R's purchases similarly could be used only on the 1971 contract. Regardless of a subsequent discrepancy in price to these suppliers, the government had to purchase *from each*, and only from each, the specified number of plugs at the agreed price under the respective contracts. This being established, the trial court erred in not granting defendants' motion for directed verdict on this aspect of plaintiffs' case.

It cannot be gainsaid that Universal and H/R were competitive *bidders* on the 1971 contract. They could not be, however, competitive purchasers as required by the Act either under their respective separate contracts or under both.[17] It is the government's unavailability to Universal as a customer of any of the government's needs under the December, 1971 contract, and its similar unavailability to H/R on the 1970 contract addition which prevents purchases made in performance on one from being in competition with those made under the other. Each contract represented a separate, distinct market open only to a single producer. Once it was awarded the

10. In addition to the defense of changing market conditions, a defendant may rebut a primafacie case of discrimination by showing that his lower price was made "in good faith to meet an equally low price of a competitor." 15 U.S.C. s 13(b). Since, as discussed *infra*, plaintiffs have failed to prove a prima-facie case we do not decide the applicability *vel non* of these defenses under the facts of this case.

11. Jones v. Metzger Dairies, Inc., 334 F.2d 919, 924 (5th Cir. 1964), *cert. denied*, 379 U.S. 965, 85 S.Ct 659, 13 L.Ed.2d 559 (1965); *accord*, Stough v. May and Co., Inc., 484 F.2d 22, 23 (5th Cir. 1973); Hiram Walker, Inc. v. A & S Tropical, Inc., 407 F.2d 4, 7 (5th Cir.), *cert. denied*, 396 U.S. 901, 90 S.Ct. 212, 24 L.Ed.2d 177 (1969). The term "purchaser" means a buyer or vender, not one who merely seeks to purchase. *E. g.*, Chicago Seating Co. v. S. Karpen & Bros., 177 F.2d 863 (7th Cir. 1949); Shaw's Inc. v. Wilson-Jones Co., 105 F.2d 331, 333 (3rd Cir. 1939).

12. Universal contracted with Texas Foundries on November 12 for the purchase of 740,000 unfinished plug castings (with delivery to continue through February, 1972) to fulfill the government's addition to Universal's 1970 contract H/R's agreement with Texas Foundries was of course in contemplation of H/R's attainment of the December, 1971 contract and required delivery beginning in January, 1972.

13. The Robinson-Patman legality of price discrimination between contracts to purchase that contemplate contemporaneous delivery, must be evaluated as of the dates the respective contracts were made. *See*, Texas Sulphur Co. v. J. R. Simplot Co., 418 F.2d 793, 806 (9th Cir. 1969).

14. 15 U.S.C. s 13(a). *E. g.*, F.T.C. v. Sun Oil Co., 371 U.S. 505, 527, 83 S.Ct. 358, 9 L.Ed.2d 466 (1963); Atlas Building Products Co. v. Diamond Block & Gravel Co., 269 F.2d 950, 954 (10th Cir. 1959), *cert. denied*, 363 U.S. 843, 80 S.Ct. 1608, 4 L.Ed.2d 1727 (1960). Hartley & Parker, Inc. v. Florida Beverage Corp., 307 F.2d 916, 921 (5th Cir. 1962); Chicago Sugar Co. v. American Sugar Refining Co., 176 F.2d 1, 7 (7th Cir. 1949); Great Atlantic & Pacific Tea Co. v. F.T.C., 106 F.2d 667, 676 (3rd Cir. 1939), *cert. denied*, 308 U.S. 625, 60 S.Ct. 380, 84 L.Ed. 521 (1940) B. & W. Gas, Inc. v. General Gas Corp., 247 F.Supp. 339, 343 (N.D. Ga. 1965).

15. F.T.C. v. Borden Co., 383 U.S. 637, 643, 86 S.Ct. 1092, 1097, 16 L.Ed.2d 153 (1966). *See* Texas Gulf Sulphur Co. v. J. R. Simplot Co., 418 F.2d 793, 806 (9th Cir. 1969), Tri-Valley Packing Ass'n v. F.T.C., 329 F.2d 694 (9th Cir. 1964); Refrigeration Engineering Corp. v. Frick Co., 370 F.Supp. 702, 712-13 (W.D.Tex. 1974). "Essentially, we have in the particular situation an analogue to standing. The customer has standing only to raise and compare those sales which are injurious to his competition." Mayer Paving & Asphalt Co. v. General Dynamics Corp., 486 F.2d 763, 770 (7th Cir. 1973), *cert. denied*, 414 U.S. 1146, 94 S.Ct. 899, 39 L.Ed.2d 102 (1974).

16. *See, e. g.*, Texas Gulf Sulphur Co., *supra*; S. S. Kresge Co. v. Champion Spark Plug Co., 3 F.2d 415, 420 (6th Cir. 1925).

17. We emphasize it was the bids on the December, 1971 contract which were in competition—not the old and new sales assailed here. These bids alone cannot form the basis for a Robinson-Patman Act claim since they do not satisfy the two-purchaser requirement. A. J. Goodman & Son, Inc. v. United Lacquer Manuf. Corp., 81 F.Supp. 890, 892 (D.Mass.1949). *See* text at note 11, *supra*. We note this circuit's decision in American Can Co. v. Bruce's Juices, Inc., 187 F.2d 919, 924 (5th Cir.), *cert. dismissed*, 342 U.S. 875, 72 S.Ct. 165, 96 L.Ed. 657 (1951), which appears to

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bid, which was a prerequisite to becoming a purchaser from Texas Foundries, Universal's 1970 contract addition was assured to it to the exclusion of all other suppliers regardless of any discrepancy in prices paid on underlying subcontracts. In the same fashion, the government pledged itself unconditionally under the 1971 contract to purchase the specified quantity of finished plugs exclusively from H/R. The very nature of these mutually exclusive commitments in the respective contracts meant that Universal and H/R could not have been "in competition" with respect to their separate purchases from Texas Foundries pursuant to the government contracts. Therefore, while the price discrepancy between the two actual purchases (as distinguished from the bids related to the 1971 contract) could have affected Universal's profits under the addition to its 1970 contract, this discrimination in no way diminished Universal's competitive ability in that plug market. "Injury to a competitor is not the test; the test is injury to competition." Lloyd A. Fry Roofing Co. v. F.T.C., 371 F.2d 277, 281 (7th Cir. 1966). *Accord*, GAF Corp. v. Circle Floor Co., Inc., 463 F.2d 752 (2nd Cir. 1972), *cert. dismissed*, 413 U.S. 901, 93 S.Ct. 3058, 37 L.Ed.2d 1045 (1973).

"Antitrust legislation is concerned primarily with the health of the competitive process, not with the individual competitor who must sink or swim in competitive enterprise. But as a necessary incident thereto, it is concerned with predatory price cutting which has the effect of eliminating or crippling a competitor. For, surely there is no more effective means of lessening competition or creating monopolies than the debilitation of a competitor." Atlas Building Products Co. v. Diamond Block & Gravel Co., *supra*, 269 F.2d at 954. *Accord*, Borden Co. v. F.T.C., 381 F.2d 175, 178 (4th Cir. 1967). Universal cannot avail itself of this approach because it failed to show an injury to competition generally or that the revenue lost under the contract addition impaired its individual competitive status.[18]

Plaintiffs' Robinson-Patman claim is presented in a setting analogous to the situation where, although a seller sells his product at different discriminatory prices, he is not liable under Robinson-Patman because his buyers are not in competition for the same ultimate users.[19] In our case, although the government is the ultimate user under both contracts, those individual contracts constitute separate, distinct markets, each unaffected by prices available in

create a special exception to the two-purchaser requirement where competitors in the same market are engaged in competitive purchasing and selling at the time of the price discrimination and where the failure of the plaintiff to consummate a second purchase of the item discriminatorily priced is directly attributable to defendant's own discriminatory practice. We conclude, however, that this exception is inapplicable on the facts now before us.

Specifically, in *Bruce's Juices*, the court held that plaintiff could bring a Robinson-Patman Act claim against defendant can manufacturer for defendant's refusal to offer plaintiff the same price on a particular type of can offered plaintiff's competitors, in spite of plaintiff's failure to purchase that particular type of can, where plaintiff was purchasing other types of cans not so discriminatorily priced and competing for the sale of its product packaged in such cans in the same market as its favored competitor. In our case, however, Universal and H/R never *purchased* in the same market. As mentioned previously, they were producing at all

times pursuant to mandatory, single-producer contracts, *i. e.*, when they purchased unfinished plug castings it was always pursuant to a preexisting government commitment that could not be altered upon the government's ability to find a lower price after entry into the contract. For this reason, the *Bruce's Juices* exception is not applicable here.

18. On the contrary, Universal must have felt that its profitability on all phases of the 1970 contract was satisfactory since it quoted its finished plug "addition" price to the government based upon a 32.5-cent casting price from Texas Foundries. Thus, though Universal could have realized an increased profit if it had received a lower casting price from Texas Foundries and not passed the savings on, even this hypothetical profit was not shown to have had the necessary deleterious competitive effect. While Universal did establish its business demise (See note 7), its proof of causation related to the deleterious effect of the failure to acquire the 1971 contract rather than the loss of profit on the 1970 contract addition.

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the other. Universal and H/R were not competing for the same consumer dollar in their activities under the 1970 and the 1971 contracts."

There being no theory which will support plaintiffs' Sherman or Robinson-Patman Act claims, the judgment below is

Reversed.

20. "The whole thrust of the Robinson-Patman Act concerns protection of competition for resale. . . . Competition is determined by careful analysis of each party's customers. Only if they are each directly after the same dollar are they competing." Ag-Chem Equipment Co., Inc. v. Hahn, Inc., 350 F.Supp. 1044, 1051 (D.Minn.1972), *modified on other grounds*, 480 F.2d 482 (8th Cir. 1973).

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APPENDIX - 10

United States Court of Appeals

FOR THE FIFTH CIRCUIT

October Term, 1974

No. 74-2246

D. C. Docket No. CA 1614

M. C. MANUFACTURING COMPANY, INC., ET AL.,
Plaintiffs-Appellees,

versus

TEXAS FOUNDRIES, INC., ET AL.,
Defendants-Appellants.

Appeal from the United States District Court for the
Eastern District of Texas

Before GOLDBERG, CLARK and GEE, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the **Eastern District of Texas, and was argued by counsel;**

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, **reversed;**

It is further ordered that plaintiffs-appellees pay to defendants-appellants, the costs on appeal to be taxed by the Clerk of this Court.

August 21, 1975

Issued as Mandate:

APPENDIX - 11

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 74-2246

M. C. MANUFACTURING COMPANY, INC., ET AL.,
Plaintiffs-Appellees,

versus

TEXAS FOUNDRIES, INC., ET AL.,
Defendants-Appellants.

Appeal from the United States District Court for the
Eastern District of Texas

ON PETITION FOR REHEARING

(November 12, 1975)

Before GOLDBERG, CLARK and GEE, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.